IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. E085 0F 2020

SCANAD KENYA LIMITED.....PLAINTIFF

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION.....DEFENDANT

RULING

1. Before the court for determination is Plaintiff's Notice of Motion dated 24/7/2020 brought under Order 2 Rule 15, Order 13 Rule 2, Order 36 Rule 1 of the Civil Procedure Rules, Sections 1A and 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. The orders sought in the application are:

a. That, the Defendant's Statement of Defence dated 7th July, 2020 be struck out with costs.

b. That, the judgment be entered in favour of the Plaintiff as prayed in the Plaint.

c. That, in the alternative, judgment on the admitted sum of Kshs. 245,002,620.12 be entered in favour of the Plaintiff, plus interest at the rate of 24% per annum from 25th March 2020 to the date when payment in full is received, and

d. That, costs of and incidental to this application be awarded to the Plaintiff.

3. The application is premised on the grounds on the face of it and the Supporting Affidavit of Reuben Mwangi, the head of the Plaintiff's Legal Department sworn on 24th July, 2020.

4. The gist of the Supporting Affidavit is that the Plaintiff's claim against the Defendant is for a sum of Kshs. 245,002,620.12 (inclusive of Value Added Tax) for services rendered to the Defendant. The services as outlined in the Plaint dated 16th March, 2020 were for the provision of strategic communication and integrated media campaign.

5. The plaintiff's application is hinged on an alleged Defendant's admission of indebtedness vide a letter dated 13th November, 2015, in which it (Defendant) promised to make the payment to the plaintiff.

6. According to the plaintiff, the Defendant filed a defence that consists of mere denials and has therefore no triable issues.

7. It is further averred that it was a term of contract between the parties that any queries related to the invoices would be raised within five (5) days and interest at the rate of 2% per month would be charged for delayed payment. According to the plaintiff, it raised several invoices but none was challenged.

8. That further, the Plaintiff followed up on the acknowledged debt vide letters dated 6th November, 2017, 29th January, 2018, 23rd April, 2018 and 13th June, 2019, none of which yielded fruits.

9. To demonstrate that the defense is a sham and has no triable issues, it is deposed that the Defendant has denied documents it authored including writing proposals for the provision of strategic communication and integrated media campaign while in the same breath admits to making payment of Kshs. 105,001,123.60 (inclusive of Value Added Tax) in settlement of Invoice No. PD 011576 dated 27th July, 2017

after receiving the Inception Report.

10. That on the above account, the Defendant is merely abusing the court process and the defence is intended to delay and distract the course of justice. Consequently, the court is asked to strike out the defence dated 7th July, 2020 and enter a judgment as prayed in the plaint.

11. The Application is opposed by way of a Replying Affidavit sworn by Obadiah Keitany, the Finance Director of the Defendant on 22nd October, 2020.

12. The deponent denies that the Defendant admitted indebtedness to the Plaintiff and that any amounts that were paid to it were for the work done, completed and approved for such remuneration.

13. He deposes that the Plaintiff has never submitted and /or presented any interim, monitoring and final reports for approval by the Defendant to warrant payment for the amounts claimed.

14. Further, that there was never a term of contract providing that a 5-day delay in challenging any raised invoice would attract 2% interest per month.

15. It is deposed that the Defendant never received any report of work done to warrant payment, and in any event, it dutifully paid the Plaintiff where the proper procedure was followed.

16. Further, that the statement of defence raises triable issues which can only be determined by way of viva voce evidence. In that case, the Plaintiff's application is aimed at depriving the Defendant the opportunity to prosecute the case based on merit.

17. It is further deposed that the application being a duplication of the Plaint is intended to clog the Judicial System and/or degrease the wheels of justice. Therefore, it is also an abuse of the court process.

18. It is therefore prayed that the application be dismissed with costs to the Defendant.

Analysis and Determination

19. The application was canvassed by way of oral submissions. Learned Counsel, Mr. Mailu represented the Applicant whilst learned Counsel, Mr. Wachira represented the Respondent. I have accordingly considered the respective rival submissions proffered by each party and I take the following view of the application.

20. The two prayers sought are sought as alternatives. My view is that the Court should first consider whether the Defendant has admitted the Plaintiff's claim or part of it. Judgment on admission is provided for under Order 36 Rule 1 of the Civil Procedure Rules which reads as follows:

> **(1) In all suits where a plaintiff seeks judgment for—**
>
> **a. a liquidated demand with or without interest; or**
>
> **b. the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,** ***where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.***

21. The prayer in the instant case is for entry of judgment on admission as evidenced in the application and the submissions by Mr. Mailu based on a letter dated 13th November, 2019, which the Defendant wrote to the Plaintiff indicating that it had been unable to settle the debt due to budgetary constraints, and that once budgetary allocation is made, the payment would be made. It was argued that this letter made reference to a letter dated 3rd October, 2019 in which the National Assembly directed that the debt be settled.

22. On the part of the Respondent, Mr. Wachira denied any admission of the alleged debt, stating that the letter dated 13th November, 2019 does not admit any amounts owing or to be paid to the Plaintiff. He further argued that there was a contest between the parties as to whether any work was done and completed so as to warrant the payment. On this, he argued, is a matter constituting a triable issue that required a full trial.

23. Mr. Wachira further argued that there was a contest on the amount of interest payable. That the Plaintiff claims an interest of 24 per cent whilst the Respondent states the interest chargeable is at 2 per cent. He submitted that this is an issue that required a full trial. He referred the court to the case **of D.T. Dobbie & Co. Limited v Joseph Mbari Muchira $ Another (1980) e KLR** to buttress the submission.

24. It was the view of the counsel that the defence was reasonable and considered the Applicant's application as intended to conduct a litigation without calling witnesses. He urged that the application be dismissed.

25. In reply. Mr. Mailu submitted that the letter dated 13th November, 2019 demanded payment of the money in issue hence the Respondent cannot deny owing the sum to the Applicant. Whilst referring to the case of **E.A.Isuzu Limited v Nairobi City Government (2020)e KLR,**

he submitted that an admission can either be implied or express.

26. As regards the alleged contest of the work done, counsel submitted that there was no evidence by documentation that the Respondent raised such a contest.

27. On the triability of the defence, he argued that the defence was not accompanied by a list of authorities, bundle of documents and list of witnesses as required by Order 7 Rule 5 of the Civil Procedure Rules to demonstrate such an argument.

28. As regards the contested interest, counsel referred the court to Invoices settled at an interest rate of 2.7 per cent for late payment reasons wherefore, the Respondent cannot now say it cannot settle the debt at the stated interest rate. The case of **Simal Velji Shah v Chem Africa Limited (2014) eKLR** was relied on in this regard.

29. I have looked at the statement of Defence by the Respondent. It denies having invited the Applicant and other like entities to make proposals for the provision of strategic communication and integrated media campaign and that the Applicant subsequently made a proposal on 18th April, 2017. It also denies that the Applicant won a bid of Ksh. 350,003, 746/= (inclusive of V.A.T) for the provision of the services.

30. It is from this background that the court should scrutinize the documents filed by the Applicant in this application and in the Plaint to determine whether they controvert the Respondent's position.

31. Annexture RM2 is Respondent's Tender NO. IEBC/455/2016-2017- REQUEST FOR PROPOSAL FOR THE PROVISION OF STRATEGIC COMMUNICATION AND INTEGRATED MEDIA CAMPAIGN CONSULTANCY SERVICES. By a letter date 29/4 2017, the Respondent, by a letter signed by its Secretary/ Chief Executive Officer informed the Managing Director of the Applicant that it had accepted its bid for provision of strategic communication and integrated media campaign consultancy services at a Unit Price of Ksh. 350, 003,746/ inclusive of V.A.T. In the letter, it was noted that the contract would be signed later. The letter is marked as Annexture RM3.

32. The Applicant accepted the offer by a letter dated 3rd July, 2017 marked RM4. Subsequently, a contract was signed between the parties on 27th July,2017 setting out the rights and obligations of each party. The same is marked RM5.

33. Without saying more, this far there is no doubt that the Applicant and the Respondent entered into a contact for the provision of strategic communication and integrated media campaign consultancy services. As such, the denial by the Respondent that it is unaware of the core duties of the Applicant, that it invited bids for such a contract and that it contracted the Applicant for such services basically constitute mere denials.

34. There is no contest that the Applicant raised an Invoice dated 27/7/2017 Number PD 011576 for Ksh. 105,001,123.60 inclusive of the V.A.T being 30 per cent of the contract value pursuant to Part 1 of Clause 6.4 of the Contract and the same was settled accordingly. The invoice is marked RM6.

35. Subsequent invoices which the Applicant claims were unsettled totaling the sum claimed are as follows;

a. Invoice No. PD 011592 dated 28.7/2017 for Ksh. 87,500,935.56 inclusive of V.A.T being 25 per cent of total contract value and accordance with Part 2 of Clause 6.4 of the contract. (hereafter first invoice).

b. Invoice No. PD011724 dated 29th August 2017 for Ksh. 87,500,935.56 inclusive of V.A.T being 25 per cent of total contract value and accordance with Part 3 of Clause 6.4 of the contract. (hereafter second invoice).

c. Invoice No. PD 012066 dated 31st October, 2017 for Ksh. 870,000,749.00 inclusive of V.A.T being 20 per cent of total contract value and accordance with Part 4 of Clause 6.4 of the contract. (hereafter third invoice).

36. The invoices have been displayed as annextures RM 7,8 and 9 respectively.

37. The specifications on the mode of payment are spelt out under Special Conditions CLAUSE 6.4 PARTS 1 TO 4. I need not restate them as they are in consonance with the what the Applicant has stated and as outlined in paragraph 39 above. The court has also been able to view the respective three unsettled invoices from the bundle of documents filed alongside the Plaint.

38. By a letter dated 6th November, 2017 to the Chairman of the Respondent, the Managing Director of the Applicant requested for the settlement of the first and second invoices.

39. Again, by a letter dated 29th January, 2018, to the CEO of the Respondent, the Applicant's Head of Legal Department requested for the settlement of the first, second and third invoices totaling Ksh. 211,209,155/- plus a 16 per cent V.A.T. It was in this letter that the Applicant issued a demand that if settlement was not made within 14 days it would pursue a legal option. Those two letters comprise the bundle of documents filed by the Plaintiff.

40. Similar demands were made by the Applicant in its letters dated 23rd April, 2019,13th June, 2019 and 3rd October, 2019 respectively. In the latter letter, the Applicant lamented that the failure to settle the debts was in contravention of the Parliamentary Public Accounts Committee's recommendation by the National Assembly that the payment be made immediately. All demands were inclusive of the V.A.T

41. In a letter dated 13th November,2019 addressed to the Head, Legal Department, Ag. CEO of the Respondent in part stated as follows;

"Reference is made to your letter dated 3rd October, 2019 demanding payments of outstanding amounts. The Commission processed all the pending bills for payment in the year 2018. However, due to lack of budgetary provision, the Commission was not able to make the payment. The Commission is engaging with the Treasury on the way forward concerning the payment of all the pending bills with a view of obtaining the allocation and funds to pay the pending bills. The payments will be processed upon provision of budget allocation and funding for the pending bills from the National Treasury."

42. I find this case similar to that of **Top In Town Dry Cleaner Services Limited v Aegis Kenya Ltd. t/a Leopard Beach Resort & Spa Hotel [2020] eKLR.** In this case, the Plaintiff prayed for judgment on admission for Kshs. 26,836,596.68 being the debt owed by the Defendant and having arisen from a contract in which the Plaintiff was to provide dry-cleaning services. Parties were unable to agree on the amount owed leading to the suit. The statement of defence admitted the provision of services but the existence of a contract was denied together with any invoice in the sum of Kshs. 40,754,847.80. The statement of defence admitted the debt in the sum of Kshs. 23,836,596.68 which it averred was subject to reconciliation.

43. The Plaintiff filed an application for judgment on admission on two grounds. That the Defendant had admitted to owing Kshs. 23, 836, 596.68 vide a letter dated the 5th January, 2019 in which the Defendant acknowledged the foregoing sum and requested to settle the same on monthly installments of Kshs. 800,000.00 till payment in full and via paragraph 10 of its statement of defence.

44. The Honourable Court in **allowing the Plaintiff's application for judgment on admission** held that:

"With the foregoing principles for consideration in applications for judgment on admissions in mind, I have posed for myself the question if the letter dated 5th January 2019 and paragraph 10 of the defence amount to a clear and unambiguous admission of debt of Kshs. 23, 836,586.68/= by the defendant? According to the letter dated 5th January 2019, it is as clear as day light that the plaintiff/applicant having demanded the sum of KES 26,261,596.68, the financial controller of the defendant/respondent admitted that the lower sum of KShs 23,836,596.68 was owed. That to this court was a conscientious, voluntary and forthright admission of part of the plaintiffs claim which leaves no doubt in the mind of any reasonable person that the sum was owed but the defendant sought indulgence not to pay at once but by installments.

It is my considered opinion that entering judgement on admission at this stage and for the specific sum admitted is the only fair and just thing to do.

The letter of 05/01/2019 when looked at in the light of pleading at paragraph 10 of the statement of defence have no doubt that no just purpose would be served by delaying the plaintiff from getting judgment on the face of that very explicit admission.

After keen consideration of the parties' pleadings, the Court adopts the view and finding that the amount owed is uncontested and incontestable to merit inviting trial by oral evidence. The result of the foregoing analysis is that I do enter judgment on admission for the plaintiff in the sum of KES 23,836,596.68 together with interests thereon at court rates from the 5/01/2019, when the admission was made, till payment in full. I also award to the plaintiff the costs of the suit."

45. I add that, the only point of departure in the above stated case with the present one is that, in the former the defence partly admitted the claim whist in the latter, the entire Plaintiff's claim was denied. However, in both, mails exchanged between the parties comprised admissions.

46. The chronology of the above correspondence is a clear testament that the Respondent admitted owing the entire debt as claimed and demonstrated by the Applicant. It admitted it had difficulties in settling the bills alongside of other creditors. The fact is that it did not admit the debt in the defence, but the evidence tendered by the Applicant totally shreds the thin, weak and mere denial of the defence proffered by the Defendant.

47. Clearly then, the defence was advanced merely because the suit could not remain undefended. The Respondent's letter dated 13th November, 2019 analyzed against the Defence filed demonstrates that the Respondent cannot sustain it at all costs. The letter justifies a conclusion that the amount owed is uncontested and would remain as such even if a full trial were to be held. In fact, it is intended to delay the process of accessing the Applicant the fruits of a justified judgment.

48. As earlier noted, this is a case of an implied admission based on the fact that the defence denied every element of the Applicant's claim. But this does not imply that the court cannot enter a judgment on an implied admission so long as the facts relied on are clear and unambiguous. See **Choitram v Nazari (1984) KLR 237** in which it was stated that:

"For purpose of Order XII rule 6 admission can be express or implied either on the pleading or otherwise eg in correspondence. Admission have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends on the language used. The admission must leave no room for doubt that the parties passed out of the stage of negotiations onto to a definite contract. It matters not if the situation is arguable, even if even if there is a substantial argument, it is an ingredient of the jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admission any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself to the jungle of words even when faced with a Plaint such as the one in this case. To analyze pleadings, to read correspondence, and to apply the relevant law is a normal function performed by judges which has become established routine in our courts…"

49. Another case in which judgment on admission where the admission was implied is that of **Isuzu East Africa Limited (Formerly General Motors East Africa Limited) v Nairobi City County Government [2020] eKLR.** In the case the Plaintiff vide its Plaint sought **Kshs. 98,532,000.02** being the purchase price of delivered motor vehicles. The statement of defence filed denied entering into any agreement with the Plaintiff, receipt of motor vehicles was denied as well as receipt of invoices. The Plaintiff pleaded that the statement of defence was a sham as it was mere denials and raised no triable issues and was aimed at delaying and frustrating the Plaintiff's quest for expeditious determination of the claim for the relief sought. The Plaintiff filed an application for judgment on admission for **Kshs. 69,296,138.00** being the outstanding balance of the debt admitted by the Defendant. The Plaintiff through its advocates demanded from the Defendant who in turn and through its advocates responded to the Plaintiff and admitted being indebted and further proposed payment in installments from the end of June, 2017. Further, on the 6th day of November, 2018, the Defendant wrote to the Plaintiff and confirmed the debt due. The Plaintiff attached reconciled accounts indicating that the Defendant made payments of Kshs. 9,617,931.000 in 2017 and Kshs. 19,617,931.00 on the 15th day of May, 2018 leading to the outstanding amount to be at Kshs. 69,296,138.00. The Honourable court found that on a totality of the facts/evidence on record there were no triable issues and allowed the Plaintiff's application for judgment on admission.

50. The instant case is pretty comparable with the two cited cases above. The letter by the Respondent to the Applicant dated 13th November, 2019 is in no uncertain terms conceding the debt. It does not require a sky rocket mind so as to deduce that the Respondent admitted the debt. This is a plain case where dragging the suit to a full hearing is a waste of precious judicial time.

51. I have nevertheless borne in mind that the discretionary power to grant the relief of a judgment on admission must be exercised sparingly. See the case **Cassam vs Sachania [1982] KLR 191** where it was held that:

> **"Granting judgment on admission of facts is a discretionary power which must be exercised sparingly in only plain cases where the admission is clear and unequivocal… Judgment on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision."**

52. But as was held in the **Choitram's case (supra),** the crux of the Respondent's letter dated 13th November, 2019 is clear, obvious that it owes the debt to the Applicant. The Defendant on the other hand has not controverted this debt by any documents save to make mere denials. In fact, the assertion that there was a contestation as to whether the Applicant completed the work should be frowned upon. This is because, one, no evidence to that effect was exhibited and two, by admitted that the Applicant's bills had been approved for payment left no room for renegotiating the justification for the payment. It is a case I cannot hesitate to find for the Applicant.

53. As regards the issue of the interest rate applicable, the Applicant makes a case that it was a term of the contract that an invoice had to be settled within five (5) days of raising it and that late payment accrued an interest of 2 per cent per month. I have read each clause of the Contract. I have seen none providing for such terms. This implies this issue can only be settled in a trial, if the parties do not agree.

Disposition

54. In the end therefore, I allow the Applicant's application dated 24th July, 2020 with the following orders:

> **(a) That judgment on admission is entered for the Plaintiff against the Defendant for the sum of Ksh. 245,002,620.12 inclusive of the Value Added Tax together with Costs and interests at court rates.**
>
> **(b) Interest at 2 per cent per month on the judgment sum is not granted as it is not admitted. The same remains triable.**
>
> **(c) I grant 30 days stay of execution of the judgment.**

DATED AND DELIVERED THIS 26TH DAY OF APRIL, 2021.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Mailu for the Plaintiff/Applicant.

2. Mr. Wachira for the Defendant/Respondent.